Supreme Court, U.S.
FILED
APR 8 2015
OFFICE OF THE CLERK

No. 14-6368

IN THE
Supreme Court of the United States

MICHAEL B. KINGSLEY,
Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF INDIANA, ARIZONA, DELAWARE, HAWAII, ILLINOIS, MICHIGAN, NEW HAMPSHIRE, PENNSYLVANIA, SOUTH CAROLINA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

GREGORY F. ZOELLER
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER HAGAN MCVEIGH
LARA LANGENECKERT
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, Indiana 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for Amici *States*
Additional counsel with signature block

QUESTION PRESENTED

Must a pretrial detainee prove both objective unreasonableness and subjective malicious intent to establish a claim for unconstitutional excessive force?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI* STATES 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. Correctional Environments Prompt Special Concerns Equally Applicable Both to Pretrial Detainees and Convicted Prisoners 6

A. Detainees share more in common with prisoners than free persons 6

B. Separately housing or visibly identifying detainees and convicts for purposes of carrying out two different constitutional standards would be costly and risky 10

II. The Fourth Amendment Does Not Apply to Pretrial Detainees' Excessive Force Claims Because Detainees Are Not "Seized" Within the Meaning of the Amendment 18

III. The Due Process Clause Provides the Appropriate Standard for Evaluation of Pretrial Detainees' Excessive Force Claims 22

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Albright v. Oliver,
510 U.S. 266 (1994).....19

Bell v. Wolfish,
441 U.S. 520 (1979).....*passim*

Brower v. Cnty. of Inyo,
489 U.S. 593 (1989).....20, 21

California v. Hodari D.,
499 U.S. 621 (1991).....19

DeHart v. Horn,
227 F.3d 47 (3d Cir. 2000).....14

Farmer v. Brennan,
511 U.S. 825 (1994).....25

Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington,
132 S. Ct. 1510 (2012).....8, 13, 22

Graham v. Connor,
490 U.S. 386 (1989).....18, 25, 26

Harper v. Sheriff of Cook Cnty.,
581 F.3d 511 (7th Cir. 2009).....7

Hudson v. McMillian,
503 U.S. 1 (1992).....24

CASES [CONT'D]

Iron Eyes v. Henry,
907 F.2d 810 (8th Cir. 1990).....14

Johnson v. Glick,
481 F.2d 1028 (2d Cir. 1973).....5, 23, 24, 26

O'Lone v. Estate of Shabazz,
482 U.S. 342 (1987).....14

Procunier v. Martinez,
416 U.S. 396 (1974).....5, 17, 22

Rhodes v. Chapman
452 U.S. 337. (1981).....22

Riley v. Dorton,
115 F.3d 1159 (4th Cir. 1997).....18, 19, 20

Rochin v. California,
342 U.S. 165 (1952).....23

Tennessee v. Garner,
471 U.S. 1 (1985).....21

Terry v. Ohio,
392 U.S. 1 (1968).....21

Trotter v. State,
559 N.E.2d 585 (Ind. 1990).....15

Valencia v. Wiggins,
981 F.2d 1440 (5th Cir. 1993).....19

CASES [CONT'D]

Whitley v. Albers,
475 U.S. 312 (1986) ..... *passim*

Wilkins v. Gaddy,
559 U.S. 34 (2010) 18

STATUTES

61 Pa. Cons. Stat. Ann. § 1151(a) 11

725 ILCS 207/50 2

Cal. Penal Code § 4007 11

Fla. Stat. Ann. § 944.17 11

Idaho Code Ann. § 20-604 11

Ind. Code § 35-33-11-1 ..... 10, 11

Iowa Code Ann. § 812.6 ..... 11, 12

Ky. Rev. Stat. Ann. § 441.540 ..... 11, 12

Md. Code Ann., Corr. Servs. § 9-303 11

Me. Rev. Stat. Ann. Title 34-A, § 1405 11

Mich. Comp. Laws Ann. § 801.55(g) 11

Minn. Stat. Ann. § 243.91 ..... 11, 12

N.H. Rev. Stat. Ann. § 21-H:8 11

N.M. Stat. Ann. § 33-3-15 11

STATUTES [CONT'D]

Nev. Rev. Stat. Ann. § 209.311 11

S.C. Code Ann. § 24-5-210(C) 11

Va. Code Ann. § 53.1-21 11

Vt. Stat. Ann. Title 28, § 702 11

OTHER AUTHORITIES

Associated Press, *Indiana Prison Riot Quelled*, USA Today (Apr. 24, 2007), *available at* http://usatoday30.usatoday.com/news/nation/2007-04-24-prison-riot_N.htm; 15

Brian Albert, Nat'l Ass'n of Counties, *State Prisoners in County Jails* (2010), http://www.naco.org/newsroom/pubs/Documents/Health 12

Dana Kaplan, *Impacts of Jail Expansion in New York State: A Hidden Burden* (2007), http://www.prisonpolicy.org/scans/ImpactsofJailExpansion_NYS.pdf 17

Doris J. James, U.S. Dep't of Justice, *Profile of Jail Inmates, 2002* (rev. Oct. 12, 2004), http://www.bjs.gov/content/pub/pdf/pji02.pdf 8, 9

OTHER AUTHORITIES [CONT'D]

Ind. Dep't of Corr., Policy No. 02-03-117, *DOC Correctional Police Officer* (2011), http://www.in.gov/idoc/files/02-03-117_DOC_Police_Officer_AP_7-1-11.pdf 15

Jim Mustian, *Gusman Pushes for New Jail Building*, Advocate, Aug. 5, 2014, http://theadvocate.com/news/neworleans/neworleansnews/9880028-123/gusmans-proposed-new-jail-could 16

Matt Adams, *Court Docs: Man Accused of Killing IMPD Officer Perry Renn to Be Moved to State Prison* (Mar. 20, 2015), http://fox59.com/2015/03/20/court-docs-man-accused-of-killing-impd-officer-perry-renn-to-be-moved-to-state-prison/.....11

Nat'l Ass'n of Counties, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* (2009), http://www.naco.org/newsroom/pubs/Documents/Health 9

Thomas H. Cohen, U.S. Dep't of Justice, *Pretrial Detention and Misconduct in Federal District Courts, 1995-2010* (2013), http://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf 9

OTHER AUTHORITIES [CONT'D]

Todd D. Minton & Daniela Golinelli, U.S. Dep't of Justice, *Jail Inmates at Midyear 2013–Statistical Tables* (2014), http://www.bjs.gov/content/pub/pdf/jim13st.pdf.....10, 17

Victor A. Patton, *Inmates' Colors Identify and Protect*, Modesto Bee (Oct. 15, 2007), http://www.modbee.com/news/local/article3094425.html.....13

Yvonne Wenger, *State Scraps Plans to Build Youth Jail in Baltimore*, Baltimore Sun, Jan. 16, 2013, http://articles.baltimoresun.com/2013-01-16/news/bs-md-youth-jail-plans-20130116_1_youth-jail-angela-conyers-johnese-treatment-facility 16

INTEREST OF THE *AMICI* STATES

The States of Indiana, Arizona, Delaware, Hawaii, Illinois, Michigan, New Hampshire, Pennsylvania, South Carolina, and Wisconsin respectfully submit this brief as *amici curiae* in support of Respondents. At least 20 States house pretrial detainees in State correctional facilities alongside convicted prisoners. Pretrial detainees are transferred to State facilities for any number of reasons, including alleviating overcrowding in local jails and removing detainees from jail environments where they have been subjected to—or even the cause of—security threats. State and local cooperation in the housing of pretrial detainees is critical to maintaining safe and secure correctional facilities in the most economical way possible.

Because pretrial detainees are often mixed with the general population of convicted prisoners in State correctional facilities, States have an interest in ensuring that prison officials may operate under a clear and consistent constitutional standard when dealing with both populations. The Court has said that convicted inmates may assert valid Eighth Amendment claims only where excessive force is undertaken "maliciously and sadistically for the very purpose of causing harm," and *not* where the force arises from "a good faith effort to maintain or restore discipline." *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (quotation omitted). The *amici* States, who share with local governments the practical, substantial concerns of dealing with mixed inmate populations, urge the Court to adopt a substantially

similar standard for addressing pretrial detainee excessive force claims. Functionally distinct excessive force standards for different inmate groups would interfere with State and local strategies for maximizing safety, security, and economy in housing inmates.

Some *amici* States also have an interest in the standard for detainee excessive force claims because they house civil as well as criminal detainees. In Illinois, for example, individuals who have been convicted of sex offenses but have served their sentences may be involuntarily, civilly committed as sexually violent persons and held in a "secure facility" operated by the Illinois Department of Human Services. *See* 725 ILCS 207/50. Institutional safety and security concerns are equally present in this type of facility as they are in prisons and jails. The *amici* States urge clarification of the proper constitutional standard for *all* non-convict detainees.

SUMMARY OF THE ARGUMENT

Pretrial detainees occupy a unique position within the criminal justice system: they have not been convicted of any crime, yet they are incarcerated. What is more, detainees are frequently commingled with the general population of convicted prisoners in both State and local correctional facilities. The similarity of their circumstances makes it reasonable to hold detainees and convicted prisoners to a substantially similar

constitutional standard when it comes to proving excessive force claims under Section 1983.

By the fact of their incarceration, detainees share more in common with convicted prisoners than with free citizens. Both populations receive due process with respect to the decision to incarcerate them, though that process varies in degree. And detainees can pose just as great a security threat as convicted prisoners. They exist within the same volatile, highly-charged correctional environment as the general convict population and are subjected to all the same tensions and conflicts inherent within that setting. Furthermore, many detainees are incarcerated because they have been charged with serious crimes, which is why they cannot make bail. Accordingly, the detainee population tends to comprise a greater number of dangerous and violent offenders than the general population of local jails.

When altercations arise between and among these populations, it is unreasonable to expect correctional officers in the heat of the moment to take account of whether they are dealing with a detainee or a convict. The need to restore order is paramount. Applying a subjective Eighth Amendment standard to convicts and an objective Fourth (or even Fourteenth) Amendment standard to detainees would only create confusion in a situation where officers will not know at a glance which inmates are entitled to a greater level of protection than others.

Visual cues—such as different colored jumpsuits for detainees—may help solve the identification problem, but would raise a host of other issues. In an altercation between a convict in an orange jumpsuit and a detainee in a green jumpsuit, an officer's concern for his own liability may lead him to overcompensate in favor of the detainee at the expense of the lesser-protected convict. Moreover, color-coding—and the perception of special treatment that goes along with it—could lead to jealousy and conflict within the inmate population.

What is more, physically separating detainees from convicts is not a viable option in many circumstances. Detainees comprise 62% of the total jail population in the United States. Housing them in separate quarters would require many local correctional facilities to undertake extensive and costly renovations or new construction. With limited city and county budgets and competing demands on local government resources, the reality is that often there is no choice but to house detainees alongside convicts. The constitutional standard adopted by this Court should take that reality into account.

Nor does the Fourth Amendment and its purely objective standard apply as a textual or doctrinal matter. The Court has said that the notion of a Fourth Amendment "seizure" is limited to initial police encounters, not ongoing detention following formal arrest and arraignment. And in no event is there support for Petitioner's unworkable theory that a detainee is seized anew with each "physically intrusive" action by a correctional officer. It cannot

be that a correctional officer might potentially face a claim for "unreasonable" force with each attempt to move an incorrigible detainee.

Instead, protection for pretrial detainees from excessive force arises from the Fourteenth Amendment's Due Process Clause, which generally affords substantive limits against egregious government conduct. Such claims generally require an element of subjective malicious intent, and there is no reason to depart from that standard here. Requiring detainees to show subjective malice to support excessive force claims would both recognize that "courts are ill equipped to deal with the increasingly urgent problems of prison administration," *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), and have the salutary effect of echoing the Eighth Amendment standard applicable to convicted prisoners. Indeed, as that standard derives from the due process claims of pretrial detainees, *see Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), the Court should take this opportunity to reconnect its excessive force doctrine with its due process origins.

ARGUMENT

I. Correctional Environments Prompt Special Concerns Equally Applicable Both to Pretrial Detainees and Convicted Prisoners

A. Detainees share more in common with prisoners than free persons

Pretrial detainees and convicted prisoners should have substantially similar standards for proving excessive force claims because they share the only characteristic of constitutional significance in this context: both groups comprise lawfully incarcerated persons. While detainees are similar to free persons in that both groups enjoy a presumption of innocence, that presumption "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (explaining that the presumption is "axiomatic and elementary" law, but operates solely *at trial*). As a result, the constitutional-rights gap between detainees and free persons is much wider than the gap between detainees and convicted prisoners, rendering similar treatment of the latter populations reasonable as a matter of principle, as well as practical necessity.

1. Like convicted prisoners, pretrial detainees receive due process with respect to the decision to incarcerate them, though obviously that process varies in degree. With respect to pretrial detainees, a judge determines in a probable cause hearing that the detainee was legitimately arrested and must be

"committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial." *Bell*, 441 U.S. at 546 n.28; *see also id.* at 536. At that point, the facility may "employ devices that are calculated to effectuate this detention[, which] results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial." *Id.* at 537.

For both detainees and convicts, the process of incarceration is comprehensive. A typical intake procedure includes "assigning the detainee an identification number, taking his picture and fingerprints, collecting any property carried by the detainee, conducting a personal history interview, performing a psychiatric screening, assigning the detainee to a division within the jail, conducting a medical examination, and a strip search." *Harper v. Sheriff of Cook Cnty.*, 581 F.3d 511, 513 (7th Cir. 2009).

Incarceration is necessary at least in part to ensure that the detainee shows up at trial. As the Court has explained, however, the far more important consideration once the detainee is part of the correctional population is that "[t]he Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained." *Bell*, 441 U.S. at 540. Such measures are not "punishment," *see id.*, but merely further the "essential goals" of "maintaining institutional security and preserving internal order and discipline . that may require limitation or

retraction of the retained constitutional rights of *both* convicted prisoners and pretrial detainees." *Id.* at 546 (emphasis added).

A detainee's status as an *inmate* of a correctional facility is sufficient by itself to justify a more searching review of excessive force claims than would apply to the claims of a free citizen or arrestee. *See id.* at 537 ("Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility."); *id.* at 547 (explaining that "even when an institutional restriction infringes a specific constitutional guarantee, . . . the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security").

2. There are other good reasons to treat pretrial detainees more like convicts and less like free persons. The Court observed in *Bell* that "[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates[; i]ndeed, it may be that in certain circumstances they present a *greater* risk to jail security and order." *Id.* at 546 n.28 (emphasis added). *See also Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1520 (2012) ("People detained for minor offenses can turn out to be the most devious and dangerous criminals.").

Consider the severity of offenses alleged against detainees: nearly 35% are charged with violent offenses, 23% with drug offenses, 22% with property offenses, and 20% with public-order offenses. Doris

J. James, U.S. Dep't of Justice, *Profile of Jail Inmates, 2002*, at 3 (rev. Oct. 12, 2004), http://www.bjs.gov/content/pub/pdf/pji02.pdf. The population of detainees is likely to comprise a greater number of dangerous individuals because bail generally is set higher and is harder to meet for more serious crimes. In comparison, convicts serving time in jails are less likely to be associated with violent offenses, most likely because those with longer sentences serve time in State prison. *See id.* (stating that less than 22% of convicts committed violent offenses.).

What is more, detainees represent high rates of recidivism. *See id.* at 7 (reporting that in 2002, 30.7% of detainees were violent recidivists and another 26.9% were non-violent recidivists); *see also Bell*, 441 U.S. at 546 n.28 (cautioning that detainees "may in many cases be individuals . . who have prior records"). *Cf.* Thomas H. Cohen, U.S. Dep't of Justice, *Pretrial Detention and Misconduct in Federal District Courts, 1995-2010*, at 6 (2013), http://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf (noting similar recidivism statistics at the federal level). "For most communities, those arrested have been arrested before, and a very small number of arrestees are making up a large majority of the arrests." Nat'l Ass'n of Counties, *Jail Population Management: Elected County Officials' Guide to Pretrial Services* 4 (2009), http://www.naco.org/newsroom/pubs/Documents/Health, Human Services and Justice/Jail Population Management Guide.pdf.

Such practical considerations should bear on the applicable constitutional standard. A Fourteenth

Amendment standard with a subjective element similar to the Eighth Amendment standard respects the Court's observation that "[p]rison administrators . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547.

B. Separately housing or visibly identifying detainees and convicts for purposes of carrying out two different constitutional standards would be costly and risky

1. Correctional facilities do not operate in an ideal world where detainees are easily and effectively separated from convicts. In fact, the opposite is true: in the vast majority of jurisdictions, detainees are housed alongside convicts at county or city jails. *See* Todd D. Minton & Daniela Golinelli, U.S. Dep't of Justice, *Jail Inmates at Midyear 2013–Statistical Tables* 7 tbl.3 (2014), http://www.bjs.gov/content/pub/pdf/jim13st.pdf. Of a total nationwide jail population of 731,208 persons in 2013, 62% were detainees and 38% were convicts. *Id.* at 1, 7.

This commingling of inmate populations occurs both within local jails and within State correctional facilities. In Indiana, for example, pretrial detainees are sometimes transferred to State facilities pursuant to Indiana Code Section 35-33-11-1—the "Safekeeper Statute"—which permits transfer if "an inmate in a county jail awaiting trial is in danger of serious bodily injury or death or represents a

substantial threat to the safety of others." In a recent, high-profile use of this statute, a man accused of killing an Indianapolis police officer was transferred from the Marion County Jail to a State correctional facility because his attorneys were concerned for his personal safety during the nearly two years it will take for his case to go to trial. Matt Adams, *Court Docs: Man Accused of Killing IMPD Officer Perry Renn to Be Moved to State Prison*, Fox59.com (Mar. 20, 2015), http://fox59.com/2015/03/20/court-docs-man-accused-of-killing-impd-officer-perry-renn-to-be-moved-to-state-prison/.

Indiana's Safekeeper Statute is not unique. Fifteen other States possess a similar law. *See, e.g.*, Cal. Penal Code § 4007; Idaho Code Ann. § 20-604; Iowa Code Ann. § 812.6; Ky. Rev. Stat. Ann. § 441.540; Me. Rev. Stat. Ann. tit. 34-A, § 1405; Md. Code Ann., Corr. Servs. § 9-303; Mich. Comp. Laws Ann. § 801.55(g); Minn. Stat. Ann. § 243.91; Nev. Rev. Stat. Ann. § 209.311; N.H. Rev. Stat. Ann. § 21-H:8; N.M. Stat. Ann. § 33-3-15; 61 Pa. Cons. Stat. Ann. § 1151(a); S.C. Code Ann. § 24-5-210(C); Vt. Stat. Ann. tit. 28, § 702; Va. Code Ann. § 53.1-21. Only Florida categorically prohibits transferring pretrial detainees to state-run correctional facilities. Fla. Stat. Ann. § 944.17.

While Indiana's law permits transfer only for safety reasons—a detainee's need for medical care, for example, is not a valid justification for transfer, Ind. Code § 35-33-11-1—other State laws authorize transfer for any reason at all (*see, e.g.*, Idaho Code Ann. § 20-604) or only for very specific reasons (*see,*

e.g., Ky. Rev. Stat. Ann. § 441.540 (allowing transfer only in the event of "threatened violence or intense feeling and public indignation" toward a detainee)). Some laws limit transfers to certain populations. *See* Iowa Code Ann. § 812.6 (incompetent persons); Minn. Stat. Ann. § 243.91 (women). And several States—including Alaska, Connecticut, Delaware, Hawaii, and Rhode Island—have no need of safekeeping laws because they have "unitary" correctional systems in which the State manages both prisons and jails. *See* Brian Albert, Nat'l Ass'n of Counties, *State Prisoners in County Jails* (2010), http://www.naco.org/newsroom/pubs/Documents/Health, Human Services and Justice/State Prisoners in County Jails Updated.pdf.

2. Correctional officers must ensure the safety of all inmates as well as prison officials and staff, to say nothing of the general public. *Bell*, 441 U.S. at 547 ("Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel . ."). Subjecting classes of intermingled inmates to different constitutional excessive-force standards would be unreasonable.

First, correctional officers will not necessarily know at first glance which inmates are pretrial detainees and which are convicts. Accordingly, more protective constitutional standards for detainees may prompt correctional officers to subordinate safety and security concerns to personal liability concerns when dealing with *all* inmates. Making a mistake as to which inmates are entitled to greater protection may be too great a risk. The Court

recently addressed an analogous situation in *Florence v. Board of Chosen Freeholders of County of Burlington*, where the Court rejected a proposal that prisons classify inmates by current and prior offenses so as to exempt detainees arrested for minor offenses from invasive bodily searches at intake. 132 S. Ct. at 1514–15. The Court observed that such a rule would require officers to make "legal determinations during the intake process," and that "[t]o avoid liability, officers might be inclined not to conduct a thorough search in any close case, thus creating unnecessary risk for the entire jail population." *Id.* at 1522. The same sort of risk would arise with different treatment standards for different classes of inmates.

Second, while it might be theoretically possible to use different-colored jumpsuits to identify different classes of inmates, doing so introduces distracting issues of both enforcement and inmate morale. Color-coding already happens in some facilities to identify different groups among the convict population including, among others, gang members, gang dropouts, inmate workers, and inmates under protective custody. *See* Victor A. Patton, *Inmates' Colors Identify and Protect*, Modesto Bee (Oct. 15, 2007), http://www.modbee.com/news/local/article3094425.html. With respect to these segments of the inmate population, color-coding aids correctional officers in keeping problematic populations apart and quickly pinpointing unauthorized movement. *See id.* An officer would know, for example, that inmate workers in tan jumpsuits are allowed more freedom of movement

than other inmates. And red and blue jumpsuits—signifying rival gang affiliations—alert officers to the need to keep these inmates apart. The color-coding system recognizes the safety benefits arising from easy visual identification of inmate traits that may engender conflict or cause safety concerns.

Requiring pretrial detainees to wear different colored jumpsuits to signify their specially protected status, however, may give rise to jealousies and other inmate frictions that can only jeopardize safety and security even further. *Cf. O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (recognizing that "special . . . arrangements for one group would create problems as other inmates . . perceive favoritism" (internal quotation marks omitted)). The mere *perception* of special treatment is a "legitimate security concern[]" for correctional facilities. *See, e.g., DeHart v. Horn*, 227 F.3d 47, 53 (3d Cir. 2000) ("[I]t is not irrational to think that providing [an inmate] with a vegetarian diet to accommodate his religious beliefs might involve some risk of inmate jealousy."); *Iron Eyes v. Henry*, 907 F.2d 810, 815 (8th Cir. 1990) (observing that exceptions to prison regulations on hair length can lead to "prisoner friction and unrest").

Third, even if jails and prisons were to identify different classes of prisoners with different-colored jumpsuits, when major riots erupt—such as in Indiana's New Castle Correctional Facility in 2007 or Pendleton Correctional Facility (then known as

the Indiana Reformatory) in 1985[1]—prison guards and law enforcement responders should not be guided in their efforts to restore order by the color of inmate jumpsuits. Such considerations would not only interfere with law enforcement strategies to restore order at a general level, but might even create incentives for law enforcement to target lesser-protected inmates more than others.

And more frequently, when prison officials encounter smaller-scale but still-dangerous incidents, it is equally critical to reestablish security. Correctional facilities are volatile, charged environments where altercations—both among inmates and between inmates and officers—are inevitable and frequent. Officers are trained to use force responsibly and only where absolutely necessary. *See, e.g.*, Ind. Dep't of Corr., Policy No. 02-03-117, *DOC Correctional Police Officer* 9 (2011), http://www.in.gov/idoc/files/02-03-117_DOC_Police_Officer_AP_7-1-11.pdf ("Correctional Police Officers shall only use that amount of physical force necessary to control the situation and ensure the safety and security of all persons involved.") Situations can escalate quickly, however, and require officers to act based on split-second decisions that, in hindsight, may appear unreasonable but that did not stem from any malicious intent.

---

[1] Associated Press, *Indiana Prison Riot Quelled*, USA Today (Apr. 24, 2007), *available at* http://usatoday30.usatoday.com/news/nation/2007-04-24-prison-riot_N.htm; *Trotter v. State*, 559 N.E.2d 585, 586-87 (Ind. 1990) (describing 1985 Indiana Reformatory riot).

Reestablishing security under these circumstances would be hampered by having to pause to consider separate standards for different classes of inmates.

3. It would be not only administratively cumbersome, but likely cost-prohibitive, to separate detainees into separate facilities from convicted prisoners. Doing so would likely require building additional jails or expanding existing ones at great taxpayer expense.

For example, the New Orleans Sheriff has proposed a $56 million facility providing 380 beds for inmates with mental illnesses. Jim Mustian, *Gusman Pushes for New Jail Building*, Advocate, Aug. 5, 2014, http://theadvocate.com/news/neworleans/neworleansnews/9880028-123/gusmans-proposed-new-jail-could. The city had been ordered to find a home for its "most mentally disturbed inmates" as part of a consent decree to improve jail conditions. *Id.*

Maryland recently abandoned plans to build a new juvenile facility that would have cost $70 million for only 120 beds. Yvonne Wenger, *State Scraps Plans to Build Youth Jail in Baltimore*, Baltimore Sun, Jan. 16, 2013, http://articles.baltimoresun.com/2013-01-16/news/bs-md-youth-jail-plans-20130116_1_youth-jail-angela-conyers-johnese-treatment-facility. A new $73 million plan aims to create more treatment programs and renovate a smaller facility for juveniles charged as adults who are incarcerated along, but by law separate from, adult offenders. *Id.*

And in 1999, Ulster County, New York began construction of a 484-bed facility projected to take five years and cost around $75 million, but that project suffered a three-year delay and $20 million in overruns. Dana Kaplan, *Impacts of Jail Expansion in New York State: A Hidden Burden* 7–8 (2007), http://www.prisonpolicy.org/scans/ImpactsofJailExpansion_NYS.pdf. What is more, the county is embroiled in litigation with facility contractors, and its citizens have been forced to foot a 40% increase in property taxes. *Id.* at 8.

Again, pretrial detainees comprise 62% of the overall jail population in the United States. Minton & Golinelli, *supra*, at 1, 7. It would be a massive undertaking, both in terms of logistics and costs, to build new facilities or renovate existing ones in order to separate detainees from the general inmate population. The reality facing most correctional facilities, therefore, is that detainees must coexist alongside convicted prisoners. In that situation, Plaintiffs' theory would require correctional officials to track and operationalize the specific constitutional protections applicable to each inmate. Such a system places too great a burden on these officials, who already face "Herculean obstacles to [the] effective discharge of the[ir] duties . . " *Procunier*, 416 U.S. at 404–05.

II. The Fourth Amendment Does Not Apply to Pretrial Detainees' Excessive Force Claims Because Detainees Are Not "Seized" Within the Meaning of the Amendment

Petitioner argues that it does not matter whether the Court evaluates pretrial detainees' excessive force claims under the Fourth Amendment or the Due Process Clause because "the fundamental rule is the same" under both: pretrial detainees need only make an objective showing of unreasonable force. Pet Br. 13. As the Court has instructed, however, it is critical in the context of an excessive force claim to "identify[] the specific constitutional right" at issue. *Graham v. Connor*, 490 U.S. 386, 394 (1989). Applying the Fourth Amendment to pretrial detainees' excessive force claims would be improper as a matter of text, doctrine, and practicality.

The Fourth Amendment does not require a separate reasonableness analysis for every action taken by the jailer as part of the detention process. Rather, the Fourth Amendment is concerned with "'the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails,' . [not] with the conditions of ongoing custody following such a curtailment of liberty." *Riley v. Dorton*, 115 F.3d 1159, 1162 (4th Cir. 1997) (quoting *Bell v. Wolfish*, 441 U.S. 520, 533–34 (1979)), *abrogated on other grounds by Wilkins v. Gaddy*, 559 U.S. 34 (2010).

Petitioner disagrees, arguing that pretrial detainees are seized for Fourth Amendment

purposes either by way of a "continuing seizure" lasting throughout the course of their detention, Pet. Br. 29, or as a result of *new* seizures that occur each time a detainee is subjected to any "physically intrusive" action by an officer. *Id.* ("[S]tate officials' actions against a detainee that are 'physically intrusive' such that they constitute a new seizure—that is, a seizure different from, or in addition to, the existing lawful detainment—are governed by the Fourth Amendment standard."). Neither theory is persuasive.

Petitioner's "continuing seizure" theory derives from Justice Ginsburg's concurrence in *Albright v. Oliver*, which observed that at common law, "an arrested person's seizure was deemed to continue even after release from official custody" and a person remains "'seized' for trial, so long as he is bound to appear in court and answer the state's charges." 510 U.S. 266, 277–79 (1994) (Ginsburg, J., concurring). The Court has never adopted this theory; to the contrary, it has recognized that "[a] seizure is a single act, and not a continuous fact." *California v. Hodari D.*, 499 U.S. 621, 625 (1991) (holding that a fleeing suspect was not seized until he was physically restrained by the police).

The Fourth Amendment itself "provides weak textual support" for extending its protections past the initial seizure. *Valencia v. Wiggins*, 981 F.2d 1440, 1444 (5th Cir. 1993) ("As the Fourth Amendment protects against unreasonable 'seizures,' it seems primarily directed to the *initial* act of restraining an individual's liberty, such as an

investigatory stop or arrest." (footnote omitted)). The Amendment's particular regulation of warrants—which concern singular acts, not ongoing restraints—suggests that it "is directed at the *arrest* of persons and not at the conditions of their custody." *Riley*, 115 F.3d at 1163. "The requirements for securing a warrant have nothing to tell us about the conditions controlling subsequent detention." *Id.* Thus, by its own terms, the Fourth Amendment's limits on seizures extend no further than "the initial decision to detain an accused." *Bell*, 441 U.S. at 533.

Perhaps recognizing this textual problem, Petitioner proposes an alternative theory that "a state officer's deliberate use of force against a lawfully detained person awaiting trial is a *new* 'seizure' . . . governed by the objective unreasonableness standard of the Fourth Amendment." Pet. Br. 31 (emphasis added). But this rule is unworkable in practice. What amount of force constitutes a new seizure? Is a pretrial detainee newly "seized" when handcuffed to be taken to court? What if a guard places a hand on a detainee while escorting him down a hallway? Certainly this is a "new physical restraint." *Id.* at 32. But surely the Fourth Amendment cannot be triggered every time a correctional officer further restrains an already-restrained detainee.

The cases Petitioner cites have nothing to say about this seizure-within-a-seizure theory. *Terry*, *Garner*, and *Brower* all have to do with *initial* police encounters and hold that an individual is "seized" during such an encounter when no longer free to

walk away. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."); *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person."); *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989) (seizure occurs "when there is a governmental termination of freedom of movement").

A pretrial detainee—unlike an arrestee or an individual undergoing an investigatory stop—is at *no* time free to walk away from custody. There are no degrees of freedom in this regard; a detainee cannot be *less* free to walk away from a guard than from the jail itself, such that he is seized anew.

Petitioner does not clarify matters by asserting that "the use of objectively unreasonable force against a pretrial detainee will virtually always constitute . a new seizure within the meaning of the Fourth Amendment." Pet. Br. 29. This is circular reasoning: A pretrial detainee is newly "seized," triggering the Fourth Amendment's objective reasonableness standard, when the detainee is subjected to force that is objectively unreasonable. In other words, a court can find that the Fourth Amendment applies only by first finding a Fourth Amendment violation. This theory of seizure is implausible and unsupported by Fourth Amendment doctrine.

III. The Due Process Clause Provides the Appropriate Standard for Evaluation of Pretrial Detainees' Excessive Force Claims

The proper standard for detainee excessive force claims must reflect the reality that "courts are ill equipped to deal with the increasingly urgent problems of prison administration . . . ." *Procunier*, 416 U.S. at 405. As the Court said in *Bell*, "[p]rison administrators . . should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 441 U.S. at 547. Precisely because prison and jail order and security are nearly always in jeopardy, "[t]he difficulties of operating a detention center must not be underestimated by the courts." *Florence*, 132 S. Ct. at 1515; *see also Rhodes v. Chapman* 452 U.S. 337, 349 n.14. (1981) (observing that a prison's internal security is "peculiarly a matter normally left to the discretion of prison administrators").

Respecting the professional judgment of state and local corrections officials requires a high standard of constitutional liability. Lest the Court invite routine second-guessing of corrections officials, it should require detainees to prove "malicious and sadistic" intent when bringing excessive force claims, just as it requires for convicted prisoners. *Whitley v. Albers*, 475 U.S. 312, 320 (1986). That standard is especially appropriate since it was originally derived from a pretrial-detainee treatment case.

1. Over sixty years ago, in *Rochin v. California*, the Court recognized that substantive due process prevents the government from engaging in conduct that "shocks the conscience." 342 U.S. 165, 172 (1952). It held that pumping a suspect's stomach to obtain evidence violated due process because such conduct did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." *Id.*

The Second Circuit applied the *Rochin* standard to a pretrial detainee's excessive force claim in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973). In an oft-quoted opinion by Judge Friendly, the court held that a correctional officer's use of force shocks the conscience where it is applied "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain or restore discipline." *Id.* at 1033. Such factors as "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted" are relevant to that determination. *Id.* Ultimately, however, the *Glick* test turns on a subjective inquiry into the intent of the accused government official and whether that intent was "malicious[] and sadistic[]." *Id.*

This Court has adopted the subjective *Glick* test in the Eighth Amendment context as the proper standard for evaluating convicted prisoners' excessive force claims. In *Whitley v. Albers*, the Court held that "[w]here a prison security measure

is undertaken to resolve a disturbance . . . we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering [in violation of the Eighth Amendment] turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" 475 U.S. at 320–21 (quoting *Glick*, 481 F.2d at 1033). The Court later extended the *Whitley* holding beyond the riot context to "*all* allegations of excessive force" involving convicted prisoners. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (emphasis added).

Significantly, the Court "derived the *Whitley* test from one articulated by Judge Friendly in *Johnson v. Glick* . . a case arising out of a prisoner's claim to have been beaten and harassed by a guard." *Id.* That the "prisoner" in *Glick* was a pretrial detainee was of no relevance to the Court's analysis in *Whitley* and *Hudson*. Rather, the Court recognized in those cases that excessive force claims often arise from circumstances where correctional officers are required to make spur-of-the-moment decisions and immediately weigh competing interests, including the need to protect staff, other government officials, the public, and detainees in a dangerous, dynamic environment. *Hudson*, 503 U.S. at 6; *Whitley*, 475 U.S. at 320. Under these circumstances, a subjective standard gives officers the protection they need to restore order without concerns for their own personal liability taking precedence. *See Whitley*, 475 U.S. at 322 (noting that a subjective-intent standard "does not insulate from review actions taken in bad faith and for no legitimate purpose, but

. requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice").

2. This rationale applies equally no matter the precise legal status of lawfully incarcerated detainees, particularly where they are housed alongside convicted prisoners. The Court recognized as much in *Bell v. Wolfish*, where it applied a subjective due process standard to claims regarding pretrial detainees' conditions of confinement. "Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of *both* convicted prisoners and pretrial detainees." *Bell*, 441 U.S. at 546 (emphasis added). Accordingly, a particular condition of confinement violates the due process clause when it "amount[s] to punishment of the detainee." *Id.* at 535. To this end, "[a] court must decide whether the disability is imposed *for the purpose of punishment* or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538 (emphasis added); *see also Farmer v. Brennan*, 511 U.S. 825, 839 (1994) ("[A] subjective approach isolates those who inflict punishment[.]").

While *Bell* applied only to pretrial detainees' conditions-of-confinement claims, the Court later observed in *Graham v. Connor*—a Fourth Amendment investigatory stop case—that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." 490 U.S. 386, 395 n.10 (1989).

The Court now has the opportunity to confirm what it said in *Graham*, and in the process bring excessive force doctrine full circle and reconnect it to its origins—the due process claims of pretrial detainees. *Whitley*, 475 U.S. at 320–21. That is, because the Eighth Amendment standard derives from Judge Friendly's due process opinion in *Glick*, the due process standard for whether detainee treatment amounts to punishment should be substantially identical. That standard—"whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm," *id.* (internal quotation marks omitted)—would both afford relief in extreme cases and protect State and local interests in efficient prison administration and equal treatment of all incarcerated individuals.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

Office of the Indiana Attorney General
IGC South, 5th Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
HEATHER HAGAN MCVEIGH
LARA LANGENECKERT
Deputy Attorneys General

ADDITIONAL COUNSEL

MARK BRNOVICH
Attorney General
State of Arizona

JOSEPH A. FOSTER
Attorney General
State of New Hampshire

MATTHEW P. DENN
Attorney General
State of Delaware

KATHLEEN G. KANE
Attorney General
State of Pennsylvania

DOUGLAS S. CHIN
Attorney General
State of Hawaii

ALAN WILSON
Attorney General
State of South Carolina

LISA MADIGAN
Attorney General
State of Illinois

BRAD D. SCHIMEL
Attorney General
State of Wisconsin

BILL SCHUETTE
Attorney General
State of Michigan

Counsel for Amici *States*

Dated: April 8, 2015